United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

w/ affidavit

75-6132

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-6132

B 9/5

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

—*against*—

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U.A., et al.,
Defendants-Appellees.

GEORGE RIOS, et al.,
Plaintiffs-Appellants,

—*against*—

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U.A., et al.,
Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFF-APPELLANT EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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Defendants-Appellees.

REPLY BRIEF FOR PLAINTIFF-APPELLANT EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Preliminary Statement

The Equal Employment Opportunity Commission ("EEOC") submits this brief in reply to the briefs submitted by the Defendant-Appellee Enterprise Association Steamfitters Local 638 ("Local 638") and Defendant-Appellee Joint Steamfitters Apprenticeship Committee

("JAC") which reveal basic misconceptions as to the nature and purpose of back pay. The appellees improperly assume that back pay is of only secondary importance under Title VII, and indeed, is but a windfall to eligible non-whites. On this basis they argue that back pay should be awarded, if at all, only to the limited class of discriminatees who applied in writing for admission to the A Branch, and should be denied to all other non-whites even though they suffered economic loss as a result of the defendants' discriminatory practices. They also improperly assume that "making whole" the victims of past discrimination is less important than other "normal" union functions. On this basis they argue that alleged financial difficulties render this critical Title VII relief unnecessary. Both of their assumptions and conclusions must be rejected.

ARGUMENT

POINT I

Back pay must be awarded to all non-whites who suffered economic loss as a result of defendants' discriminatory practices.

The Supreme Court, in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975) rejected any notion that back pay is of secondary importance in a Title VII case.

> "Title VII deals with legal injuries of an economic character occasioned by racial or other antiminority discrimination. The terms 'complete justice' and 'necessary relief' have acquired a clear meaning in such circumstances. . . [Where] a legal injury is of an economic character, '[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by

> which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.' *Wicker* v. *Hoppock*, 6 Wall. 94, 99 (1867)." 422 U.S. at 418-19.

Indeed, the Supreme Court in *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 421, and this Court in *EEOC* v. *Local 28 Sheet Metal Workers*,—F.2d—, slip op. 2481, 2502 (2d Cir. March 8, 1976), have made clear that an award of back pay to those who have suffered economic loss from unlawful discrimination can be denied only for "reasons which, if applied generally, would not frustrate the central statutory purposes" of Title VII.

On the record of this case, the necessity of a full back pay award is evident. As stated in the EEOC's main brief (pp. 8-9), the district court found that Local 638 and JAC had for many years unlawfully discriminated against non-whites in admission to the A Branch and the apprenticeship program, and in work referral practices. However, although the district court ordered injunctive and affirmative relief, it excluded many, if not most, of the non-whites affected by the discriminatory practices from even coming forward to prove the resulting economic harm each had suffered. The district court thus failed to compensate or "make whole" the victims of Local 638's and JAC's past discrimination. The injury that these victims have suffered—in terms of lost employment opportunities, wages and other benefits —is of "an economic character" which can properly be remedied only through awards of back pay. *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 418; *EEOC* v. *Local 28*, *supra*, slip. op. at 2502-03; see *Franks* v. *Bowman Transportation Co.*, 44 U.S.L.W. 4356, 4362-63 (March 24, 1976).

In *EEOC* v. *Local 28*, *supra*, this Court reversed a requirement identical to the one imposed by the district

court in this case that affected class members must present documentary evidence of application to the union and the apprenticeship program in order to receive an award of back pay. It ruled that testimonial evidence of application and rejection could support a back pay award. This Court's decision in *Local 28* reversing such a documentary requirement directly necessitates reversal of the district court's denial of back pay here to certain classes of non-whites whom the court had found to be the victims of discrimination. These included those non-whites who can prove by testimonial evidence that they applied for and were rejected for A Branch membership, or that they sought and were discriminatorily denied entrance to the JAC apprenticeship program and those who can present either documentary or testimonial evidence that they sought and were discriminatorily denied work at job sites as a result of the informal discriminatory work referral system.

As to the liability of the JAC, we note that the JAC in the *Local 28* case served an identical function as the JAC here.[1] Compare the District Court's findings in *EEOC* v. *Local 28*, 401 F. Supp. 467, 474 (S.D.N.Y. 1975) with *United States (EEOC)* v. *Local 638*, 360 F. Supp. 979, 985 (S.D.N.Y. 1973).[2]

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[1] Insofar as Local 638 argues that it should not be liable for back pay to apprentices on account of its alleged lack of control over the JAC, we note that the union does not dispute that it appoints half of the members of the JAC. On remand from this Court, the District Court would of course have discretion to apportion liability for back pay to apprentices between Local 638 and JAC.

[2] The same arguments made by the JAC here as to the alleged "speculative" nature of damages to such individuals were made by Local 28 and JAC in that case (Reply Brief on Behalf of Local 28 and the JAC, Docket No. 75-6079, p. 14) and have already been rejected by this Court. See *EEOC* v. *Local 28, supra*, slip op. at 2503.

The liability of Local 638 for the discriminatory effects of its informal word-of-mouth work referral practices (see EEOC main brief, p. 18 n. **) cannot be escaped because of its lack of a hiring hall as such. As this Court concluded in the *Local 28* case with respect to direct union admission, the lack of a written record should not preclude an award of back pay.[3]

Going beyond the expansion of the back pay award here which is dictated by this Court's decision in *EEOC* v. *Local 28*, *supra*, we note that under the facts of this case, direct application for membership in the A Branch is not the touchstone for demonstrating the economic loss and consequent right to back pay for the discriminatory actions of the union. There is a large class of easily identified non-whites who were working in the industry during the relevant time period, were then qualified for A Branch membership according to non-discriminatory standards, and desired such membership, but were deterred from applying because they appropriately believed such action would be useless. The determination of this group involves no speculative consideration.[4]

Pursuant to the district court's orders of April 16, 1971 (A. 105-106); January 3, 1972 (A. 124-156), and June 21, 1973 (A. 566-579), a large number of non-

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[3] Contrary to Local 638's assertions, its informal hiring practices are not unique in the construction industry. See *EEOC* v. *Local 28*, *supra*, 401 F. Supp. at 474.

[4] See Back Pay Order of October 9, 1975, setting as one of the criteria for receiving back pay that the claimant "was admitted to the A Branch under the provisions of this Court's Orders of April 16, 1971, January 3, 1972, or June 21, 1973, or is qualified to be admitted under this Court's order of June 21, 1973." A. 778.

The district court has already established in this order a method for computing the *amount* of back pay to those who prove their individual entitlement to an award. A. 778.

whites who had been working in the industry were admitted to union membership.[5]

It is clear that these individuals would have become A Branch members earlier if they had had the opportunity to do so. A Branch membership confers obvious and substantial benefits to workers in the industry. As the district court found, A Branch membership, in addition to assuring higher rates of pay, is a substantial aid to obtaining employment as a construction steamfitter in the territorial jurisdiction of Local 638; a prerequisite to obtaining job security and preventing early layoff; and an opportunity for advancement and earning overtime pay. 306 F. Supp. at 984-85; 501 F.2d 622, 627. On the other hand, there are no apparent disadvantages to A Branch membership which would even arguably support a notion that large numbers of minority construction steamfitters would choose not to become A Branch members.[6]

These qualified non-whites workers who applied for A Branch membership pursuant to the trial court's orders

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[5] Of the approximately 800 non-whites who became members of the A Branch by July 1974, 152 were admitted to the A Branch in 1972 under direct order of the district court (A. 180; 337 F. Supp. 217, 219; 360 F. Supp. 979, 989), and six were admitted pursuant to agreement between the government and the union (A. 180; 360 F. Supp. at 989). The rest were admitted pursuant to the district court's decree entered on June 21, 1973, after trial, pursuant to which non-whites with four years of prescribed experience who either passed a practical examination or were properly certified by an employer were to be admitted to full A Branch membership.

[6] Compare *Thornton* v. *East Texas Motor Freight*, 497 F.2d 416 (6th Cir. 1974) where the court emphasized that transfer to over the road driver positions was not desirable to everyone because although the job provided greater pay, it also required much longer hours and substantial periods of time away from home.

stand in much the same position as the plaintiffs in *Acha* v. *Beame*, —F.2d—, slip op. 2041 (2d Cir. February 19, 1976) who wanted to join the police force but were deterred by the defendant's discriminatory practices and eventually sought employment when the job was opened to women, and who were awarded seniority from the date they would have been appointed absent the discrimination. As this Court pointed out in *Local 28*, slip op. at 2503, n. 6:

> The fact that the *Acha* plaintiffs all eventually did seek employment as police officers when that job was finally opened to women also makes it more likely that they may indeed have been deterred from applying only by the defendants' discrimination.

In view of the overwhelming interest of black and Spanish-surnamed workers in A Branch membership demonstrated in response to the orders of the district court, and the obvious desirable benefits of A Branch membership found by the district court and this Court, it must be presumed, unless the union can prove otherwise, that each of the non-whites who later applied for A Branch membership and was admitted as a consequence of the trial court's orders, wanted to join the A Branch at the time he became eligible for such membership, and would have applied had he not believed such application was futile.[7]

The record in this case affirmatively shows that in fact workers in the industry failed to apply for membership in the union only because they knew such applica-

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[7] In such circumstances, the date for commencement of relief would be the date on which the claimant qualified for A Branch membership according to non-discriminatory criteria, rather than his application date, *Bing* v. *Roadway Express, Inc.*, 485 F.2d 441 (5th Cir. 1973).

tion would be futile. For example, Mr. Carlton testified that he wanted to be a member of the A Branch because of the advantages of such membership, but did not apply because he saw that those who tried to gain admission to the A Branch had failed. A. 126-27. Thus, it was improper for the district court to presume that damages to persons who did not apply to the A Branch were hypothetical.

Under the circumstances here, it would be unreasonable and unfair to hold that the non-whites, who applied as soon as they could, were not entitled to relief under Title VII because they had not made formal application at a time when they knew that the union would not accept them into the A Branch. Courts have frequently held that it is not necessary for persons to perform futile acts in order to receive relief. Specifically they have held that an application is not a condition to obtaining back pay when application would have been futile. *E.g.*, *Sagers* v. *Yellow Freight System, Inc.*, — F.2d —, slip op. 2699, 2709-10 (5th Cir. April 2, 1976); *Hairston* v. *McLean Trucking Co.*, 520 F.2d 226, 231 (4th Cir. 1975). For example, in *Sabala* v. *Western Gillette, Inc.*, 516 F.2d 1251, 1256 (5th Cir. 1974), the court held:

> Although an application requirement would be an easy device for establishing the identity of class members who should recover damages and for establishing an appropriate date for application of the rightful place doctrine, the equities of such a requirement are almost certainly illusory. It makes little sense to require of minority employees, retrospectively, formal application for transfer to positions that they reasonably knew to have been closed to their class.

We are not dealing here with a "phantom class" of persons who may or may not be qualified and may or may

not have wished to join the A Branch. The individuals here were working in the industry, had no reason not to join the A Branch, and did in fact join as soon as they could. They are entitled to back pay.

POINT II

Back pay must be awarded notwithstanding defendants' claims of financial difficulties and the costs of other normal business activities.

Local 638 and JAC seek to avoid their back pay obligations completely—or at least partially to the extent of a *pro rata* reduction of individual back pay awards[8]—by their prediction of financial ruin for the union and JAC and failure of the Affirmative Action Plan if back pay is awarded.

Such an excuse must be rejected as a reason which, if applied generally, would frustrate the statutory purposes of eradicating employment discrimination and making whole those persons who have suffered monetary loss through past discrimination. *Albemarle Paper Co.* v. *Moody, supra; EEOC* v. *Local 28, supra.* Further, their present claims are unsubstantiated and overstated;[9]

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[8] The district court, while rejecting the union's argument that the union's financial condition should excuse it completely from back pay, did provide for possible *pro rata* reductions of individual back pay awards should such action prove to be warranted by the circumstances. 400 F. Supp. at 993. Such a possible *pro rata* reduction of back pay should also be reversed, for the reasons stated herein.

[9] Thus, for example, the fact that secretarial assistance, paper, telephone service and postage have been required to implement the Affirmative Action Plan (Local 638 Brief, pp. 20-22) is insignificant, compared with other union expenses and the admission fees and dues received from new non-white members. The union's

[Footnote continued on following page]

as a minimum, any ultimate proof of financial condition is premature since both the facts as to their aggregate back pay liability and as to their financial condition at the time such awards become payable are not known to the Court at this time. Indeed, if there should ever arise a financial problem in implementation of the Affirmative Action Plan, the parties always have the flexibility of offering proof to the Administrator and ultimately the district court, together with alternate suggested means of achieving the goal of eliminating the present effects of past discrimination.[10]

Implicit in both Local 638's and JAC's arguments is that their remedial obligations under Title VII—in terms of the Affirmative Action Plan and back pay—are less important and entitled to a lesser call on their resources than more traditional union and JAC functions. It is submitted that such notions are erroneous and this Court should make clear to the union and JAC that its Title VII responsibilities are of fundamental importance.

If in fact the present level of Local 638's financial resources is insufficient to meet its back pay responsibilities to the victims of its past discrimination, then it must seek increased or additional sources of income,

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claim that back pay will ultimately result in a depression of the wage structure (Local 638 Brief, p. 25) is totally speculative, unsupported and irrelevant. The possibility that the union will have a substantial deficit in the 5-year period ending in 1979 (Local 638 Brief, p. 36) is speculative and irrelevant, especially given that the Affirmative Action Plan goal is to be achieved by July 1977. Indeed, the union's own report concludes that the solution to such a problem would properly be an increase in union dues and assessments (Local 638 Brief, p. 36).

[10] Much of the union's brief deals with its compliance with the Affirmative Action Plan's requirements to date. Rather than being a defense to back pay, we merely note that these union actions were ordered by the district court; non-compliance would likely have resulted in proceedings for contempt.

including, if necessary, increased membership dues or assessments of union members who have not suffered the effects of this discrimination.[11] The Supreme Court in *Franks* v. *Bowman Transportation Co.*, *supra*, although recognizing that remedial action (there retroactive senority) may diminish the economic expectations of other "arguably innocent employees," held that it may be necessary because its denial "would frustrate the central 'make-whole' objective of Title VII." 44 U.S.L.W. at 4364. Indeed, the Supreme Court clearly instructed that

> "[the result establishing that] a sharing of the burden of the past discrimination is *presumptively necessary*—is entirely consistent with any fair characterization of equity jurisdiction, particularly when considered in light of our traditional view that '[a]ttainment of a great national policy . . . must not be confined within narrow cannons for equitable relief deemed suitable by chancellors in ordinary private controversies.' *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. at 188." *Id.* at 4365.

See also *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 663 (2d Cir. 1971) ("Assuming arguendo that the expectations of some employees will not be met, their hopes arise from an illegal system. If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.")

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[11]Likewise, contributions to the financing of the JAC or the industry Educational Fund which is controlled by the collective bargaining agreement with Local 638, can be altered. See *United States* v. *Bethelehem Steel Corp.*, 446 F.2d 652, 663 (2d Cir. 1971).

Here, the union members who may be affected by increased dues or asessments have historically been the economic beneficiaries of the union's discriminatory policies and practices (*e.g.*, increased work opportunities and overtime) and indeed, have permitted their elected officials to implement and continue such policies and practices. Thus, they should not now be heard to complain that they are being made to unfairly bear the burden of the defendants discrimination.

This Court's decision in *Local 28*, *supra*, slip op. at 2502-03, upheld and expanded the union's liability for back pay and emphasized that "back pay should be given as broadly as possible in order to effectuate the dual policies of remediation and deterrence," despite Local 28's predictions of impending disaster to the union's finances and the collective bargaining proocess. [12] (Reply Brief on

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[12] Local 638's further attempt to distinguish the impact of back pay liabilities here from the cases where an employer was found liable on the ground that in those cases the employer could pass on its back pay "costs" to its customers must be rejected (Local 638's Brief, p. 26). If anything, union members have less standing to object to such a pass on since, unlike corporate customers, they have been direct beneficiaries of Local 638's discrimination.

Likewise, Local 638's citation to the cases denying back pay awards against unions under the National Labor Relations Act are inapposite. As the Board stated in *Union National de Trabajadores, etc.*, 219 N.L.R.B. No. 66, 89 L.R.R.M 1741, 1742 (1975):

> "[E]mployees legally damaged by the tortious conduct of unions might be better served by pursuing those private remedies traditionally used for the recovery of such damages. Use of such remedies would bring these employees before tribunals which have more experience and are better equipped than this Board to measure the impact of tortious conduct including violence, and to make victims whole for loss of pay and any other injury." (Footnote omitted.)

As the Board suggested there, the District Court here is the proper tribunal to make whole the victims of Local 638's discrimination.

behalf of Local 28 and the JAC, Docket No. 75-6079, pp. 17-19). As in this case, in *Local 28*, union membership dues and assessments were the sole source of funds for the back pay awards. See *EEOC* v. *Local 28*, 401 F. Supp. 467, 491 (S.D.N.Y. 1975).

Other courts have also required unions to pay back pay awards, *E.g.*, *Russell* v. *American Tobacco Co.*, — F.2d—, 10 E.P.D. ¶10,412 (4th Cir. 1975), *cert. denied*, —U.S.— (April 18, 1976); *United States* v. *United States Steel Co.*, 520 F.2d 1043 (5th Cir. 1975); *Johnson* v. *Goodyear Tire and Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *United States* v. *Bricklayers, Local No. 1*, 5 E.P.D. ¶ 8480 (W.D. Tenn. 1973), *aff'd and mod. on other grounds sub nom., United States* v. *Masonry Contractors Assoc. of Memphis, Inc.*, 497 F.2d 871 (6th Cir. 1974); *Robinson* v. *Lorillard* Corp., 444 F.2d 791 (4th Cir. 1971).[13]

In *Russell* v. *American Tobacco Co.*, *supra*, the Court rejected the union's argument that it should be excused from its back pay obligations because the company could better absorb the cost. Here, Local 638 is essentially arguing that the victims of the discrimination are better able to absorb the cost of the discrimination than is the union. Surely such an argument appeals even less to equity than does the union's argument in *Russell*.

In sum, any exclusion or reduction of back pay in this case must fail if Title VIII's remedial purpose is to have any vitality. There can be no doubt that the non-whites

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[13] That the unions in these cases were held jointly liable with the employers and thus were called upon to pay only a portion of the aggregate back liability does not, of course, necessarily mean that the financial impact was insignificant.

who have been denied access to the union, its work referral program and the apprentice program have been injured, and that Local 638 and JAC are directly responsible for that injury. Should they nonetheless be permitted to avoid that responsibility by pleading alleged financial limitations—a situation over which the union can exert significant control by altering its dues and assessment structure—then the tangible effects of its past discrimination will continue and the promise of Title VII will yet remain unfulfilled.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the District Court's order on back pay be reversed with directions to enter an order for back pay against both Local 638 and JAC in accordance with the opinion of this Court.

Dated: New York, New York,
April , 1976.

Respectfully submitted,

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Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Pauline P. Troia being duly sworn, deposes and says that s he is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 30th day of April, 19 76 s he served a copy of the within reply brief of govt

by placing the same in a properly postpaid franked envelope addressed:

1) Marilyn Walter, Esq., Robert Roberts, Esq., 423 West 118th St. NY NY 10027
2) Dennis Yeager, Esq., Tufo, Johnston & Allegtero, Esqs., 645 Madison Ave. NY NY 10022
3) Richard Brook, Esq., Delson & Gordon, Esqs., 230 Park Ave. NY NY 10017
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And deponent further says s he sealed the said envelope s and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

30th day of April, 19 76

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977